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New Executive Orders on Labor Relations Will Impact All Federal Contractors

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With a quick stroke of the presidential pen on Friday, January 30, 2009, President Obama signed three executive orders that will greatly impact federal government contractors. The orders mark a dramatic shift from Bush administration policy. Specifically, President Obama's three orders require the following: (1) all federal contractors must post notices informing employees of their rights to form and join unions; (2) all federal contractors may not seek reimbursement for funds spent on influencing employees regarding unionization; and (3) all federal contractors succeeding to a service contract must provide job opportunities to employees of the previous service contractor.

1. Notification of Employee Rights Under Federal Labor Laws

The first executive order requires that all federal contractors post a notice informing employees of their rights under the federal labor laws, such as the National Labor Relations Act (NLRA). President Obama's stated rationale for the order is to "promote economy and efficiency in Government procurement" by reducing "labor unrest." The Secretary of Labor is instructed to develop the notice through rulemaking within 120 days. The Secretary is also authorized to administer and enforce this order through "necessary and appropriate" rules and regulations. Penalties for failure to post the notice or to include it in covered subcontracts could include contract cancellation and possibly debarment from future opportunities to contract with the federal government.

Further, the order revokes a 2001 order from President George W. Bush (Executive Order 13201) that required the posting of a "Beck" notice at federal contractor workplaces. The "Beck" notice informed employees of their right not to join a union and to refuse to pay union dues unrelated to collective bargaining and connected activities. (The executive order is available at online at http://morganlewis.com/documents/ExecOrder_EmployeeRights_30Jan2009.pdf.)

2. Restrictions on Expenses Related to Influencing Employees Regarding Unionization

The second executive order impacts all federal contractors and mandates that costs associated with so-called "persuader activities" designed to influence employees to join or not join a union are *not reimbursable* by the federal government under the government's contract with the employer. These costs are now labeled "unallowable" and "shall be excluded from any billing, claim, proposal, or disbursement" under federal contracts. Examples of "unallowable" costs include (a) preparing and distributing materials; (b) hiring or consulting legal counsel or consultants; (c) holding meetings with employees; and (d) planning or conducting activities by managers, supervisors, or union representatives during work hours. Certain costs related to maintaining an existing union-management relationship are

still "allowable" under an exemption. Federal contractors are not precluded by the executive order from engaging in advocacy or persuader activities, but they may not seek reimbursement for such expenses.

The order also instructs the Federal Acquisition Regulatory Council (FAR Council) to issue rules and regulations for contractors within 150 days.

California attempted a similar restriction on state contractors, but the United States Supreme Court of found the state law pre-empted by the federal NLRA. *See Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008). *See also Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (finding an executive order from President Clinton that banned federal contractors from permanently replacing strikers pre-empted by the NLRA). Accordingly, President Obama's order may face a challenge based on the NLRA pre-emption doctrine. (The executive order is available at online at http://morganlewis.com/documents/ExecOrder_GovContracting_30Jan2009.pdf.)

3. Nondisplacement of Qualified Workers Under Service Contracts

The third executive order impacts federal contracts covered by the Service Contract Act. The order requires that all service contracts include a clause granting a "right of first refusal" to all employees (except managerial and supervisory employees) employed by the predecessor contractor. This order reinstates a similar order implemented by President Clinton (Executive Order 12933) that was rescinded by President Bush in 2001 (Executive Order 13204).

Successor contractors and covered subcontractors remain free to determine how many employees are needed to perform the contract, and to choose to use fewer employees than the predecessor. Once that decision is made, however, offers of employment to predecessor contractor employees must be made and remain open for at least 10 days. This order virtually guarantees that any existing workforces that are unionized will remain so once the successor begins performing the service contract.

Within 180 days of the order, the Secretary of Labor is directed to issue regulations implementing the order. The order also grants the Secretary of Labor the power to impose sanctions against contractors for noncompliance and to declare contractors ineligible for future government contracts for up to three years. (The executive order is available at online at http://morganlewis.com/documents/ExecOrder_Nondisplacement_30Jan2009.pdf.)

Conclusion

The implementation of these three executive orders, under rules and regulations adopted by the Secretary of Labor and the FAR Council, likely will occur by the end of this year, if not sooner. The orders could have a significant impact on those federal contractors and covered subcontractors currently performing or seeking federal contracts with workforces that are not unionized. President Obama has also supported a number of legislative proposals favorable to unions, including the Employee Free Choice Act (EFCA), and these executive orders are only the first step in furthering a union-supported agenda before the legislative battles to come.

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